STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 17, 2013
v	No. 300581 Wayne Circuit Court
JONATHON SMITH, Defendant-Appellant.	LC No. 10-001380-FH

Before: SAAD, P.J., and SAWYER and JANSEN, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial conviction of second-degree home invasion, MCL 750.110a(3), for which he was sentenced to 90 to 180 months in prison. We affirm.

Defendant's first argument on appeal concerns his trial counsel's alleged conduct in engaging in a loud argument with defendant and defendant's mother and grandmother outside the courtroom following jury selection in this case. Trial counsel allegedly said that defendant should have been in prison and referred to defendant's first trial in this matter, which ended in a hung jury. Although no such incident was reported during or immediately after trial by defendant, his family members, or the jurors, defendant and his family members testified about this alleged incident at the *Ginther*[1] hearing on defendant's claim of ineffective assistance of trial counsel. Trial counsel also testified at the hearing. He testified that he would never discuss a case in front of jurors. Though he did not specifically recall any conversation in the hallway, he denied ever telling defendant that he should be in prison. He acknowledged that he might have said that defendant was fortunate because of the outcome of the first trial.

Defendant argues that his initial appellate counsel, who represented him at the *Ginther* hearing, rendered ineffective assistance by failing to call the jurors from his trial to testify at the hearing. Defendant argues that the jurors' testimony was necessary to establish that trial counsel's alleged conduct was prejudicial. Defendant also argues that the trial court had a duty to call and question the jurors *sua sponte*. We disagree with defendant.

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews a trial court's findings of fact for clear error, and questions of constitutional law de novo. *Id*.

Effective assistance of counsel is presumed and a defendant bears a heavy burden of proving otherwise. *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005). "'In order to overcome this presumption, defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms. Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different.'" *Id*. (citations omitted). "[T]he test of ineffective assistance of appellate counsel is the same as that applicable to a claim of ineffective assistance of trial counsel." *People v Uphaus* (*On Remand*), 278 Mich App 174, 186; 748 NW2d 899 (2008). Thus, a defendant must show that appellate counsel's performance "fell below an objective standard of reasonableness and prejudiced his appeal." *Id*.

Defendant fails to establish that appellate counsel was ineffective for failing to call the jurors to testify at the *Ginther* hearing. First, decisions regarding what evidence to present and which witnesses to call are presumed to be matters of strategy. *People v Dunigan*, 299 Mich App 579, 589-590; 831 NW2d 243 (2013). "[W]e will not second-guess strategic decisions with the benefit of hindsight." *Id*. This rule presumably applies not only to trials, but also to evidentiary hearings such as that conducted in this case. Appellate counsel may have believed that the testimony of defendant and his family members was sufficient to establish that trial counsel's conduct was deficient and unprofessional, and that some jurors were likely present in the hallway and overheard the discussion. He may have calculated that the time and expense of subpoenaing the jurors was unnecessary.

Second, defendant cannot establish that appellate counsel's allegedly unreasonable performance prejudiced him at the *Ginther* hearing unless he can demonstrate that calling the jurors as witnesses would have established the prejudice prong of his claim of ineffective assistance of trial counsel. Several things must have occurred in order for trial counsel's conduct to have prejudiced defendant at trial: (1) the exchange between trial counsel and defendant's family must have actually occurred as defendant claims, (2) one or more jurors must have been present to hear the exchange, and, most importantly, (3) the exchange must have caused the jury to convict defendant when it otherwise would have acquitted him.

A review of the evidence strongly suggests that the jurors would have convicted defendant of second-degree home invasion regardless of whether they overheard trial counsel's alleged statements in the hallway. "Second-degree home invasion requires proof that the defendant entered a dwelling by breaking or without the permission of any person in ownership or lawful possession or control of the dwelling and did so with the intent to commit a felony, larceny, or assault therein or committed a felony, larceny, or assault while entering, present in, or exiting the dwelling." *Dunigan*, 299 Mich App at 582; see also MCL 750.110a(3).

According to the testimony at trial, while the owner of the home in question was away, a next-door neighbor saw a man get out of a black car and try to enter the home. The next-door neighbor alerted a second neighbor, who called 911. A short time later, the police arrived and went around the back of the house. They observed that a back window and door were open, and that the house had been "ransacked." As the police officers walked through the house and toward the front door, the second neighbor saw the man come out the front door and get into the black car. She alerted the police. One of the police officers saw that the neighbor was pointing to a black Intrepid. The police officers followed the car, never losing sight of it. They were able to stop it about a mile later, and arrested defendant, who was the only occupant of the car. The homeowner testified that he had not given anyone permission to enter his home while he was away, and this was not disputed. Though the homeowner testified that nothing was missing from the home, he also testified that he returned to find the home a mess, that things had been moved, and that the television was on the couch. As the prosecutor argued at trial, this demonstrated defendant's intent to commit larceny. Nor was there any serious question of mistaken identity. Given the strength of the evidence presented at trial, appellate counsel's questioning of the jurors at the *Ginther* hearing could not have established prejudice with respect to defendant's claim of ineffective assistance of trial counsel. Therefore, defendant cannot establish that appellate counsel's failure to call the jurors affected the outcome of the *Ginther* hearing.

Defendant also argues that the trial court "had an inherent duty to control the proceedings and to inquire of the jurors as to whether their verdict was impacted by the alleged knowledge of [trial counsel's] comments." This argument was not raised below, and is therefore reviewed for plain error. *People v Conley*, 270 Mich App 301, 305; 715 NW2d 377 (2006).

The only legal support defendant offers for his argument is a passing reference to *People v Spencer*, 130 Mich App 527; 343 NW2d 607 (1983), and MCL 768.29. The *Spencer* Court considered a trial court's "'duty . . . to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved.'" *Spencer*, 130 Mich App at 539, quoting MCL 768.29 The trial court in *Spencer* had acknowledged on the record that inadmissible and highly prejudicial evidence was admitted during the jury trial, yet failed to declare a mistrial. This Court concluded that the trial court should have declared a mistrial because the errors that pervaded the trial deprived the defendant of a fair trial. *Id*. at 541.

MCL 768.29 applies specifically to *trial* proceedings, and *Spencer* concerned the effect of inadmissible and prejudicial evidence introduced during a jury trial. Defendant fails to support the proposition that the trial court in this case had an affirmative duty to subpoena witnesses to testify at a *Ginther* hearing. Indeed, it was defendant's burden at the *Ginther* hearing to establish the factual predicate for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Defendant has not demonstrated that the trial court had a duty to *sua sponte* call and question the jurors during the *Ginther* hearing.

Defendant's second argument on appeal is that the closure of the courtroom during voir dire violated his Sixth Amendment right to a public trial. Alternatively, he argues that trial counsel's failure to object to the closure constituted ineffective assistance of counsel.

Because defendant failed to make a timely assertion of his Sixth Amendment right to a public trial before the trial court, this claim is forfeited and our review is for plain error affecting defendant's substantial rights. *People v Vaughn*, 491 Mich 642, 653-665; 821 NW2d 288 (2012).

There is no reference in the trial transcript to any decision to close the courtroom, or any indication that anyone was asked to leave the courtroom before voir dire. At the *Ginther* hearing, however, defendant's grandmother and mother both testified that they were asked to leave the courtroom during voir dire, and were told that they could reenter after the jury was selected. Defendant's grandmother said that it might have been the bailiff who asked them to leave, but she did not recall. Defendant also testified, "My mom and them, nobody was in the courtroom besides the people that are here now, the prosecutor, the lawyer, me and just the jury . . . ." We will assume, for the sake of addressing defendant's argument, that defendant's mother and grandmother were in fact asked to leave the courtroom.

When the circuit court orders the courtroom closed before voir dire without advancing an overriding interest, a plain error has occurred. *Vaughn*, 491 Mich at 665. The *Vaughn* Court also held that, because structural errors are intrinsically harmful without regard to their outcome, a plain structural error such as this affects a defendant's substantial rights. *Id*. at 666.

Because defendant does not claim that he is actually innocent, the issue here, as in *Vaughn*, is whether closure of the courtroom was an error that seriously affected the fairness, integrity, or public reputation of the proceedings. In *Vaughn*, the Court concluded that "[b]ecause the closure of the courtroom was limited to a vigorous voir dire process that ultimately yielded a jury that satisfied both parties, we cannot conclude that the closure 'seriously affected the fairness, integrity, or public reputation of judicial proceedings.'" *Id.* at 668-669.

The same is true here. Both parties asked several questions of the potential jurors, excused some, and had no further challenges or objections to the jurors that were ultimately selected. Defendant has not established that the exclusion of his family members from the courtroom during the voir dire process seriously compromised the fairness, integrity, or public reputation of the trial. *Id*.

Defendant argues in the alternative that trial counsel was ineffective for failing to object to the closure of the courtroom. We review this unpreserved claim of ineffective assistance of counsel for errors apparent on the record. *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011).

As the *Vaughn* Court explained:

> Defense counsel should be "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." The inquiry into whether counsel's performance was reasonable is an objective one and requires the reviewing court to "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." This standard

> requires a reviewing court "to affirmatively entertain the range of possible 'reasons . . . counsel may have had for proceeding as they did.'" [*Vaughn*, 491 Mich at 670 (citations omitted).]

Here, as in *Vaughn*, defendant's trial counsel might have reasonably concluded that proceeding with a jury voir dire that was closed to the public benefitted defendant. *Id.* at 670. After all, "'[r]easonable trial counsel might conclude that the potential jurors will be more forthcoming in their responses when the courtroom is closed, that the proceedings will be less likely to be tainted by outside influences, or might simply find the procedure preferable because it will expedite the proceedings.'" *Id*. (citation omitted). Defendant has not overcome the presumption that trial counsel's apparent failure to object was reasonable.

Even if defendant had shown that trial counsel's performance was unreasonable, "an ineffective assistance of counsel claim premised on either counsel's waiver of or failure to object to the Sixth Amendment right to a public trial requires a showing of actual prejudice before the defendant is entitled to relief." *Id.* at 674. Because defendant does not claim that closure of the courtroom during voir dire tainted the jury selection process or the jury that was ultimately chosen, and because defense counsel actively participated in the process and was apparently satisfied with the outcome, it must be presumed that the resulting jury was able to act as a fair and neutral fact finder. *Id*. Defendant is not entitled to relief on his claim of ineffective assistance of counsel.

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Kathleen Jansen